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in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

LAND & LEISURE, INC., et al.,

Petitioners,

vs.

ROGER L. SUMMER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE O. MITCHELL
of Lane Mitchell & Harris, P.A.
900 Security Trust Building
700 Brickell Avenue
Miami, Florida 33131
Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FORMER FIFTH CIRCUIT'S REVERSAL OF THE TRIAL COURT'S IN LIMINE DISPOSITION OF PLAINTIFF SUMMER'S CLAIMS BROUGHT PURSUANT TO § 17 OF THE 1933 SECURITIES EXCHANGE ACT AND § 10b OF THE 1934 SECURITIES ACT AND RULE 10b-5 PROMULGATED THEREUNDER, WAS UNJUSTIFIED, WHERE THE COMPLAINT ALLEGED FACTS SHOWING PLAINTIFF'S DUE DILIGENCE IN DISCOVERING THE DEFENDANT'S FRAUDULENT CONCEALMENT OF THEIR INJURIOUS ACTIVITIES AND WHERE THE COMPLAINT REQUESTED INVOCATION OF THE FEDERAL EQUITABLE TOLLING DOCTRINE.

II. WHETHER THE FORMER FIFTH CIRCUIT'S DECISION THAT THE TOTALITY OF CIRCUMSTANCES PRESENT IN THE INSTANT CASE DID NOT PERMIT DISMISSAL PURSUANT TO FRCP 12(b)(6), SO UNFAIRLY REQUIRES DEFENDANTS TO DEFEND AGAINST THE ALLEGATIONS COMPLAINED OF BY SUMMER, AS TO WARRANT REVIEW BY THIS COURT.

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OPINIONS BELOW

The Former Fifth Circuit's opinion is reported in Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. 1981). The opinion of the United States District Court for the Southern District of Florida, is unreported. However, the trial court's opinion is included in the Appendix of Petitioner Land & Leisure's Brief, App. 14-73.

JURISDICTION

Petitioners seek review of the Former Fifth Circuit's opinion rendered on December 28, 1981, and the denial of rehearing rendered on January 29, 1982, pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Since there is no federal statute of limitations applicable to private actions brought pursuant to § 10b of the Securities Exchange Act of 1934 and under the Commission's Rule 10b-5, federal courts generally look to the most closely analogous state statute of limitations. Ernst & Ernst v. Hochfelder, 425 U.S. 185 at 210, n. 29, 96 S.Ct. 1375, at 1389 (1976). In the instant case, the district court held that F.S. 517.21, which provides for a two year limitation period, was most appropriate. See Brief for Petitioner Land & Leisure, App. 15.

However, since F.S. 517.21 was repealed, effective January 1, 1975, the district court applied the statute of limitations for fraud, F.S. 95.11(3). The latter provides for a limitation period of four years.

Since all but the last of Summer's purchases of Land & Leisure stock occurred before January 3, 1973, the trial court applied the shorter two year statute of limitations, F.S. 517.21, to all but Summer's last purchase. Id. Accordingly, the trial court held that F.S. 517.21 barred Summer's claims for purchases of Land & Leisure stock from June 24, 1971 through December 27, 1972. Id. The trial court then applied F.S. 95.11(3), the four year statute of limitations, to Summer's final purchase of Land & Leisure stock on January 3, 1973, and held this claim was likewise time barred.

The Former Fifth Circuit held that, although state law controls the limitation period within which 10b claims must be initiated, federal law controls the tolling of this limitation period, i.e., when the clock begins to run. Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1975).

The Former 5th Circuit reviewed the three facts which th trial judge found dispositive, i.e., (1) Land & Leisure, Inc.'s failure to hold annual shareholder meetings; (2) Land & Leisure, Inc.'s failure to send annual shareholder reports; and (3) the decline in the price of Land & Leisure

stock during the period encompassed by the complaint. 664 F.2d at 969-970. Given the totality of the facts, the Former Fifth Circuit ruled that it was error for the trial judge to conclude that " 'it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Id., at 670, citing Conley v. Gibson, 335 U.S. 41, at 45-46, 78 S.Ct. 99, 101-02 (1957).

STATEMENT OF THE FACTS

Roger L. Summer, Respondent in the instant case, purchased 3,000 shares of Land & Leisure stock through Raymond James, an underwriter, on June 24, 1971 (Brief for Respondent Land & Leisure, Inc., App. 23). Over the course of the next two years, Summer continued to invest in the corporation, and by January 3, 1973, had accumulated 9,500 shares and had invested a total of approximately $54,000 in Land & Leisure stock. Id. In securing these purchases, Summer relied on the Prospectus for Land & Leisure which was filed with the SEC and which was sent to the Plaintiff through the mails in connection with the public offering of Land & Leisure common stock. (See Respondent Land & Leisure's Brief, App. 24, citing Summer's complaint).

The Prospectus contained false and misleading statements of material facts as well as omissions necessary in order to make the representations not misleading. Id., App. 24-39. Plaintiff Summer, in May 1977, successfully sued Land & Leisure to enforce his right to review the books and records of the corporation. (Id., App. 38). However, Defendants dragged their feet in complying with the court-ordered disclosure and continued to injure Summer by concealing their fraudulent activities. Id. Summer sought redress of his injuries, totalling $54,000, in the United States District Court for the Southern District of Florida on February 23, 1978. Id., App. 1.

I

THE TRIAL COURT IN THE INSTANT CASE ABUSED ITS DISCRETION IN DETERMINING THAT, AS A MATTER OF LAW, THE STATUTE OF LIMITATIONS APPLICABLE TO PLAINTIFF'S FEDERAL SECURITIES FRAUD CLAIMS HAD TOLLED AND THUS, THE TRIAL COURT'S DECISION THAT PLAINTIFF'S FEDERAL SECURITIES CLAIMS WERE TIME BARRED WAS APPROPRIATELY REVERSED.

Defendant Land & Leisure contends that the Former Fifth Circuit has erroneously thwarted the policies underlying statutes of limitation by reversing Judge Gonzalez, Jr.'s 12(b)(6) dismissal of Plaintiff Summer's federal securities law violation claims, even where the complaint alleged facts of Defendant's fraudulent concealment and Plaintiff's due diligence sufficient to justify invocation of the federal equitable tolling doctrine. (Brief for Petitioner Land & Leisure, pp.10-17). For their proposition that the policies of repose and protection of Defendants from "the cost and vexation of protracted litigations," Petitioners curiously rely on the Supreme Court's decision in U.S. v. Kubrick, 444 U.S. 111, 100 S.Ct. 352 (1979) and on the Tenth Circuit's decision in State of Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir. 1981), cert. den., 102 S.Ct. 392 (1981).

Kubrick involved a complicated malpractice suit brought by a veteran against the government pursuant to the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2401(b), for neomycin treatment improperly received at a veteran's hospital in January 1969. Id., at 353, 354. The FTCA, which waives the government's sovereign immunity, contains a two-year limitation provision. Id., at 354-357. This two-year limitation provision, applicable to claims brought under FTCA, represents the balance Congress struck in the context of tort claims brought against the government. Id. With this unequivocable expression of Congressional intent to implement a policy of encouraging prompt presentations of tort claims brought against the government in hand, the Supreme Court ruled in Kubrick that courts are not free to circum-

vent such express legislative intent through either too restrictive or too liberal a construction of FTCA limitation provisions. Id., at 357. The court noted that in actions brought under FTCA a plea of limitation is a meritorious defense, in itself, serving public interest. Id.

While on first glance, the bare holding of Peterson appears to support Respondent's contention that summary disposition was warranted in the instant case, the principles laid down by the Tenth Circuit therein actually support the Former Fifth Circuit's decision in Summer v. Land & Leisure, et al., 664 F.2d 965 (5th Cir. 1981). The Tenth Circuit in Peterson recounted the principles of the equitable tolling doctrine set forth by the Supreme Court in Bailey v. Glover: "when a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered.' " 651 F.2d 687 (10th Cir. 1981), citing 21 Wall. (88 U.S.) 342 (1875). The Tenth Circuit noted that the Supreme Court extended the Bailey rule "to statutes borrowed from the states in federal question cases," so that "[t]he borrowed limitations period does not begin to run 'until after [plaintiff] had discovered, or had failed in reasonable diligence to discover, the alleged deception.' " Peterson, at 692, citing Holmberg v. Armbrecht, 327 U.S. 392, at 397, 66 S.Ct. 582, at 585 (1946).

The Tenth Circuit also identified two disparate lines of cases dealing with the issue of summary disposition of federal security regulation claims in which plaintiffs seek to invoke the equitable tolling doctrine. Id., at 692, note 9. After reviewing the origins of the equitable tolling doctrine and the requirement that a plaintiff seeking to invoke the doctrine must have exercised reasonable diligence in the pursuit of federally created remedies, the court stated:

> [5] In view of the equitable origin of the tolling doctrine, we think there remains some room for discretion by the court on the issue of plaintiff's discovery and diligence in cases under

§ 10(b) when the pleadings show that the action would be time-barred but for the equitable doctrine. In the cases where other circuits have affirmed summary judgment on diligence, the district judges have essentially decided the tolling issue in the manner of chancery.[13]

[13] As many authorities have said, the question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. Aldrich v. McCulloch Properties, Inc., supra, 627 F.2d at 1042; 6 L. Loss, Securities Regulation, 3905 (2d ed. Supp. 1969). Nevertheless, trial judges frequently conclude that dismissal in limine is the proper disposition of cases such as this, and such dismissal has often been upheld on appeal. Cases like those cited in footnote 9 supra cannot be adequately explained as individual determinations of law, each on a question of first impression unique to the particular facts of the case. We think that equitable discretion by the trial court is a better explanation.

651 F.2d 687, at 693.

Given the fact that Ohio's 10(b) claim in Peterson alleged substantially the same facts as in a prior litigation, the Tenth Circuit held that:

" . . . summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such time as to bar the action.

"If the documents before the court are not sufficiently persuasive to meet this stringent test, a jury ultimately deciding the facts will determine by a preponderance of the evidence whether

> the action accrued too remotely. We uphold the trial court's order in this case because we find that it was well supported by the record and was not an abuse of discretion. Id., at 694 (footnote omitted).

Notwithstanding the benefit of statutes of limitation to defendants and to the courts, the Tenth Circuit refused to adopt a hard and fast rule in Peterson and confined the trial judge's equitable discretion to summarily dispose of federal securities claims to cases where the documents before the court would clearly and convincingly persuade the trial judge that plaintiff failed to exercise reasonable diligence in discovering the alleged fraud, supra. Moreover, the Tenth Circuit cited a line of cases in which summary judgment was reversed on appeal. Id., at 692. These cases, which the Tenth Circuit distinguished from the facts presented in Peterson, are analogous to this instant case and are treated infra. Respondent in the instant case does not argue that "diligence and the time of discovery are necessarily questions for the jury" and cannot be decided by the court on summary disposition, as did the plaintiff in Peterson. Id. Rather, the facts presented by the instant case are such that summary disposition in this particular case would unfairly terminate any possibility that plaintiff's rights will be vindicated and that the propriety of the actions undertaken by the defendants will be resolved.

Nor can judicial convenience and economy justify the premature extinction of viable claims. Rather, the Tenth Circuit, in declining to apply the rule in Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1978); Sperry v. Barggren, 523 F.2d 708 (7th Cir. 1975) and Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975), simply held that the facts presented in the record alleging fraudulent concealment were "insufficient to fool the hypothetical diligent plaintiff and toll the statute." Id., at 694. For the underlying purposes of the federal securities acts would be undermined if all otherwise viable claims were time barred as a matter of law where defendants successfully concealed their fraud long enough for the arbitrary limitations

provision to expire. It was the recognition of the inherent unfairness of such results which prompted the federal courts to adopt the equitable tolling doctrine.

In contrast to Congress' express intent to limit actions against the government brought under FTCA, the 1934 Securities Exchange Act does not provide for a limitations period applicable to private actions. Id., 651 F.2d 687, at 691, citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210, n. 29, 96 S.Ct. 1375, 1389 (1976). Defendant's reliance on Kubrick and Peterson, then, fails to give cognizance to the broad remedial purposes behind the SEC regulations, i.e., to protect investors from fraudulent activities in the securities market by requiring disclosure of material facts. For the policy behind the federal securities act was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." Azalea Meats, Inc. v. Muscat, 386 F.2d 5, at p.9 (5th Cir. 1967), citing GSEC v. Capital Gains Bureau, 375 U.S. 180, 186, 86 S.Ct. 275 at 278 (1963).

"When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity," such as the equitable tolling doctrine, "in the enforcement of federally-created equitable rights." Holmberg v. Armbrecht, 327 U.S. 392, at 395, 66 S.Ct. 582, at 584 (1946). The equitable tolling doctrine, which "is read into every federal statute of limitations," has long been utilized by federal courts to assure that the interests of justice are carried out in cases where defendant's own fraudulent activities are used as a defense to time bar an otherwise viable claim. Id., at 585.

> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains

> in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." Id., at 585, citing Bailey v. Glover, 21 Wall. 342, 348, 22 L.Ed. 636.

In the instant case, the complaint raised sufficient questions of facts to justify adjudication on merits of the issues whether want of due diligence by the plaintiff made it unfair to allow Summer to pursue the defendant and whether fraudulent conduct on the part of the defendant may have prevented Summer from being diligent and thus it would be "unfair to bar Summer's appeal to equity because of mere lapse of time." Id., at 584-85.

Against the broad remedial provision of the Truth in Securities Law (as the federal securities are called), defendant offers no counterveiling public interest in time barring the federally-created right of an investor to hold accountable the officers of a publicly-held corporation who have fraudulently concealed the true cause of plaintiff's injury. Rather, defendants rely on the general policy behind statutes of limitation, supra. While Plaintiff Summer acknowledges the utility of statutes of limitations, both to potential defendants and to the courts of developed legal systems, Plaintiff urges this Court to uphold the Fifth Circuit's decision that the policies underlying federal securities regulation, i.e., disclosure and fairness, outweigh any private interests defendants have in avoiding full adjudication of Plaintiff's claims on the merits and a determination of the truth as to the allegations of fraud.

Moreover, many of the auxiliary concerns which statutes of limitations are designed to eradicate are not present in the instant case. Whatever impairment of the judicial truth finding purpose inheres in allowing Plaintiff Summer the opportunity to litigate his claims on their merits, is speculative and most likely will be minimal. (Petitioner's

Brief, p.11, citing Kubrick, 444 U.S. at 111, 122 and 124). To the contrary, if Plaintiff's claims are deemed "time barred," the judiciary itself will have abdicated its truth-finding function in toto. To hold Plaintiff's claim "time barred: would reward Defendants for having effectively concealed their fraudulent activities in direct contravention of the Eleventh Judicial Circuit's order for as long as they did.[1]

In addition, the disparate policies underlying FTCA and federal securities regulations, respectively, supra, Kubrick is distinguished from the instant case in that Kubrick did not dispute that he was aware of his injury and its probable cause in January 1969. Id., at 357. In upholding the general federal rule that "a tort claim accrues at the time of the plaintiff's injury," Id., at 358, the court there held that a plaintiff in Kubrick's position "armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." Id., at 360. The court held that Kubrick did not exercise "all reasonable diligence" and in light of express Congressional intent, ruled that the failure to pursue legal remedies, having knowledge of the cause of his injury, could not be excused. Id., note 10.

The Former Fifth Circuit found that the decline in the price of Land & Leisure stock would not have necessarily put a reasonably diligent investor on notice, as a matter of law, that Defendants had perpetrated fraud which proximately caused the injury done to Summer. Summer v. Land & Leisure, Inc., 664 F.2d 965, at 969 (5th Cir. 1981). First of all, the bulk of Summer's purchases of Land & Leisure stock transpired subsequently to the substantial decline in price, and all of

[1]Summer sued Land & Leisure, Inc. and Robert R. Fischer in order to secure access to the corporation's books and records, Case No. 77-14177. Brief for Petitioners Land & Leisure, Inc. App. 53.

Summer's purchases were made through an underwriter, Raymond James & Associates. Id., at 969. Moreover, the Fifth Circuit reasoned that if Land & Leisure's independent accounting firm, Arthur Young, and the underwriter were not put on notice by the decline in Land & Leisure stock:

> "it is a reasonable inference that it would not have put Summer on notice. We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." Id., at 969.

Yet, even if this Court were to overturn the Fifth Circuit's determination that the decline in price of the Land & Leisure stock would not have put the reasonable investor on notice as to Defendant's fraudulent conduct, the question remains at what point in the random walk of stock market price listings are duly diligent investors charged with knowledge of a conspiracy to defraud for purposes of tolling the borrowed state limitation provisions? The wisdom of the Former Fifth Circuit's adherence to the universally accepted practice that the issue of due diligence in cases where facts bearing thereon are in dispute, as in the instant case, ought not to be disposed of in a summary manner, shines like a beacon in the dark. Id., at 970.

II

THE FORMER FIFTH CIRCUIT'S DECISION THAT THE TOTALITY OF CIRCUMSTANCES PRESENT IN THE INSTANT CASE DID NOT PERMIT DISMISSAL PURSUANT TO RULE 12(b)(6) Fed.R.Civ.P., DOES NOT SO UNFAIRLY REQUIRE DEFENDANTS TO DEFEND AGAINST THE ALLEGATIONS COMPLAINED OF AS TO WARRANT REVIEW BY THIS COURT.

Petitioners in the instant case contend that Summer did not exercise due diligence and that his "stale claim" is time barred. (Brief for Petitioner Land & Leisure, pp.14-15). This is so, Petitioners contend, because "Summer's knowledge in 1971 was as a matter of law, at the very least, sufficient to put him on 'inquiry notice.' " Id., at 16.

Petitioner cites recent circuit court decisions in which the totality of information received by or available to the plaintiff was deemed sufficient to put a reasonable investor on notice that, at the very least, inquiry as to some readily apparent discrepancy should be undertaken. (Brief for Petitioners Land & Leisure, pp.16-17). While the Petitioners correctly state the general principle that an injured plaintiff must exercise due diligence in the pursuit of rights protected by federal securities law, Petitioners' argument that these cases should control the instant case is misguided. (Id., citing, inter alia, Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980).

In Jablon, the Ninth Circuit affirmed the trial court's summary disposition of plaintiff's 10b-5 claim where there were declining stock prices, coupled with a broker's affirmative misrepresentation that the stock in question would rise in value and that there would be both a split and an increase in dividends. Id., at 681, 682. Thus, the Ninth Circuit refused to invoke the equitable tolling doctrine, as plaintiff there requested. And since facts constituting constructive notice afforded plaintiff an opportunity and imposed some duty of inquiry with which the plaintiff had failed to comply, the court in Jablon held plaintiff's claims were time barred. Id.

In affirming the trial court's summary disposition of plaintiff's claims in Jablon, the Ninth Circuit outlined the interrelationship of the two district Federal Rules of Civil Procedure relating to summary disposition. Id., at 682. "A motion under Fed.R.Civ.P. 12(b)(6) to dismiss for failure to state a claim can be granted only if it appears beyond a doubt that plaintiff can prove no set of facts in support of his or her claim." Id., citing Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957). The affirmative defense of the statute of limitations may be properly raised by either a motion for dismissal or by summary judgment. Id., at 862. "If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss." Id., citing Graham v. Taubman, 610 F.2d 821 (9th Cir. 1979), Bethel v. Jendeco Construction Co., 570 F.2d 1168, 1174 (3d Cir. 1978), Fuls v. Shastina Properties, Inc., 448 F.Supp. 983, 986 (N.D. Cal. 1978).

"Rule 12(b)(6) Fed.R.Civ.P. permits the court to consider a motion to dismiss accompanied by affidavits as a motion for summary judgment. If the motion is treated as one for summary judgment, all parties shall be permitted to present all materials pertinent to the motion." Id., citing Rule 56 Fed.R.Civ.P. Thus, following the procedure outlined above, the court in Jablon held that, since the plaintiff's own allegations showed she had notice of facts constituting the alleged fraud occurred before 1972, two years before bringing suit, there existed no issue of material fact and therefore defendants were entitled to judgment as a matter of law. Id., citing Poller v. Columbia Broadcasting System, Inc., 386 U.S. 464, 82 S.Ct. 486 (1962); Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977).

As distinguished from the instant case, Jablon was decided on summary judgment, not a motion to dismiss, Id., at 682. Thus, as the Ninth Circuit pointed out in Jablon, "[w]hen a motion to dismiss is based on the running of the statute of limitations," as in the case at bar, "it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." Id., citing Leone v.

Aetna Casualty & Surety Co., 599 F.2d 566 (3d Cir. 1979). Moreover, the subject matter in Jablon concerned marginal accounts, which are a type of loan made by a broker to an investor for a monthly fee, and not the type of securities purchased by Summer. 614 F.2d at 682, note 10. Thus, the very nature of the securities in Jablon provided the plaintiff with actual notice "of her stocks' declining value because she was periodically required to pay margin calls." Id. Lastly, the broker in Jablon made affirmative misrepresentations as to the bright future of the stocks in question and encouraged plaintiff there to purchase additional shares, despite the fact that concurrent price declines contradicted his earlier predictions. Id. In affirming the trial court's decision, the statute of limitations barred Jablon's 10b-5 action, the Ninth Circuit held that "a reasonably prudent person would have realized within two years that Turner's [the broker's] prediction was incorrect." Id., at 682-83.

Similarly, in Buder the Eighth Circuit held that "the defendants in this action have met their burden of establishing, as a matter of law, that the plaintiff's 10b-5 claim is barred by the statute of limitations. 644 F.2d 690, at 692 (8th Cir. 1981). However, the court went on to state that "[t]he Court will refuse to grant summary judgment for the defendants if there is an issue as to when the limitations period began." Id., at 692, citing 10 Wright and Miller, Federal Practice and Procedure, § 2734, n.31 at 651, Dzenitis v. Merrill,Lynch,Pierce,Fenner & Smith, Inc., 494 F.2d 168, 171 (10th Cir. 1974).

Having determined that a two-year limitations period, borrowed from an analogous state securities regulation statute, was appropriate, the Eighth Circuit stated that "[t]he two-year limitations period for plaintiff's 10b-5 claim runs from the date of the discovery of the fraud or from the date the fraud upon reasonable inquiry should have been discovered." Id., citing Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir. 1970), cert. den., 400 U.S. 852, 91 S.Ct. 47 (1970). "Thus, it is not only the subjective judgment of the defrauded party that is relevant. Commencement of the period is also tested by an objective standard of

diligence on the part of the plaintiff in discovering the fraud." Id., citing (cf.) Fox v. Kane-Miller Corp., 542 F.2d 915 (4th Cir. 1976).

Under the objective standard of due diligence, the Eighth Circuit concurred with the trial court's decision that, given the totality of information available to the plaintiffs, they were not justified in waiting to investigate. Id., at 692-93, citing Turner v. Lundquist, 377 F.2d 44, at 48 (9th Cir. 1967).

> "The facts were such as to "excite inquiry" in Buder; the statutory period "need not await his 'leisurely discovery of the full details' regarding his claim." In re Alodex Corp. Securities Litigation, 392 F.Supp. 672, 684 (S.D. Iowa 1975), aff'd, 533 F.2d 372 (8th Cir. 1976); Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970). Id., at 693.

Notwithstanding the findings that the plaintiffs were on inquiry notice, the Eighth Circuit reversed the trial court's denial of plaintiff's motion for leave to amend his complaint as inconsistent with the liberal amendment policy of Rule 15(a) and as an abuse of its discretion. Id., at 694-95.

> In this case, there is significant hardship to the plaintiffs. As a result of the court's ruling, the Buders have been denied a trial on the merits of their fraud claim.
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> * * * * *
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> On the basis of the record, we cannot say that genuine factual issues are not present as to plaintiffs' right to recover for these alleged misrepresentations.
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> The district court's decision to deny plaintiff's motion to amend their complaint may have been based, in part, on a perception that the plaintiffs were unlikely to succeed on the merits of their claim. The amendments should be denied on this basis only if they assert clearly frivolous claims or defenses. Id., citing Norbeck v. Davenport Community School District, 545 F.2d 63, at 70; Harvey v. Eimco Corp., 32 F.R.D. 598, 600 (E.D. Pa. 1963) (footnote omitted).

In Townsend v. Columbia Operations, defendant's motion to dismiss pursuant to 12(b)(6) was converted into a motion for summary judgment, as the trial court considered matters extraneous to the pleadings, i.e., four documents which inadvertently were not formally filed with the clerk nor entered into the civil docket. 667 F.2d 844, at 849 (9th Cir. 1982). Nonetheless, the Ninth Circuit held that the four documents in question were "properly used by the district court and were properly made a part of the record." Id. "Once matters outside the pleadings are considered by the court, a Rule 12(b)(6) motion must be treated as a motion for summary judgment." Id., citing (see) Dorado v. Kerr, 454 F.2d 892, 896 (9th Cir. 1972). Plaintiff's fatal mistake in Townsend was the failure to request "the district court to submit 'outside' materials opposing summary judgment." Id., at 850. Having found that "there is no genuine issue as to any material fact," the Ninth Circuit ruled that "defendants are entitled to judgment as a matter of law." Id.

Once an investor has actual knowledge of fraud or is charged with constructive knowledge of fraud, in order to toll the applicable statute of limitations by invocation of the equitable doctrine of fraudulent concealment, he must have remained ignorant of the fraud "without any fault or want of diligence or care on his part." Hupp v. Gray, 500 F.2d 993, at 997 (7th Cir. 1974), citing Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874). In Hupp, "undisputed facts in the plaintiff's complaint and deposition reveal that Hupp was on notice by March 1967, at the very latest, of the facts from which he should have known of the claimed

fraud." Id., at 996. The Seventh Circuit, relying on their earlier decision in Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972), applied the three-year statute of limitations of the Illinois Securities Law (Ill. Rev. Stat. ch 121-1/2, § 137.13D). Id. Since over four years had elapsed between Hupp's last purchase of the securities in question there and the filing of his complaint, the Seventh Circuit affirmed the trial court's summary disposition of his claims. Id. The court chastized Hupp's "narcous" in failing to bring suit earlier, citing Klein v. Bower's often quoted statement that the statutory limitations provision does "not await appellant's leisurely discovery of the full details of the alleged scheme." 421 F.2d 338, 343 (2d Cir. 1970).

The court in Hupp distinguished Dzenitis v. Merrill Lynch Pierce Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974), where the alleged fraud was churning, an activity "not easily recognizable to unsophisticated investors," 500 F.2d 993, at 996, note 3. Rather, Hupp offered no reason for his failure to act affirmatively in determining why his stock "had failed so dismally to live up to Gray's [Hupp's broker's] representations." Id., at 997. The court went on to enumerate factors, in addition to the existence of a fiduciary relationship, which a court should consider in determining whether a particular plaintiff has exercised due diligence: "A court should also consider other factors, including the nature of the fraud alleged, the opportunity to discover the fraud, and the subsequent actions of the defendants." Id., citing Morgan v. Koch, 419 F.2d 993, at 997 (7th Cir. 1969).

CONCLUSION

Defendant Land & Leisure relies on the policy underlying limitation provisions of medical malpractice and tort claims against the federal government to maintain that repose and avoidance of court costs outweigh Plaintiff's right to pursue a federally-created right. Despite the clear intent of Congress to protect investors from the sort of fraud perpetrated by Defendants in the instant case and in the absence of Congressionally imposed limitation provisions in the Securities Exchange Act of 1934, Defendants would have this Court rule that Plaintiff's otherwise viable claim should be dismissed merely because an arbitrary period has expired in which Plaintiff did not discover Defendant's fraud. Thus, Defendants boldly petition this Court for review, despite their efforts to conceal the fraud which gives rise to Plaintiff's cause of action. The interests of justice, which the Federal Rules of Civil Procedure seek to serve, mandate that Plaintiff, at the very least, is entitled to a jury determination of his due diligence in the pursuit of his rights. District Judges, who seek to clear their dockets through summary disposition of valid claims, might otherwise deny reasonably diligent investors their day in court, contrary to the objectives of the federal securities laws. If Congress intended to so curtail its expressed concerns for full disclosure and fairness in securities transactions and to overrule its long, though silent, acquiescence of the judicially created, longstanding equitable tolling doctrine, Congress has at its disposal the means to do so.

Respectfully submitted,

LANE MITCHELL & HARRIS, P.A.
900 Security Trust Building
700 Brickell Avenue
Miami, Florida 33131
Counsel for Respondent

BY GEORGE O. MITCHELL
GEORGE O. MITCHELL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to JESSE C. JONES, ESQUIRE, Attorney for Petitioner, 1820 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131, on this [redacted], 1982.
2nd day of June,

LANE MITCHELL & HARRIS, P.A.
900 Security Trust Building
700 Brickell Avenue
Miami, Florida 33131
Counsel for Respondent

BY GEORGE O. MITCHELL
GEORGE O. MITCHELL